BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals for the 8th Circuit is not yet reported and is at pages 74 to 82 of the record.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is July 31, 1945.

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are as follows: Sec. 347, 28 U. S. C. A., providing:

> "* * * In any case, civil or criminal, in a circuit court of appeals, * * * it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." (Which said statute in its present form was adopted February 13, 1925, 43 Stat. 938.)

3. And also Section 377, 28 U. S. C. A., providing:

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute,

which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

III.

Statement of the Case.

This has already been stated in the preceding petition (pages 1 to 37). It is hereby adopted and made a part of this brief.

IV.

Specifications of Errors.

1. The court erred in holding that the judge of the trial court committed no error in rendering a judgment dismissing plaintiff's case for a wrong reason, and in holding it was barred by a statute of limitation not pleaded by respondent and which had no application to the case or action.

2. The court erred in holding that petitioner had no right to recover on Count I of the petition.

3. The court erred in holding that petitioner had no right to recover on Count II of the petition.

4. The court erred in holding that Sections 71 and 72, Title 28, U. S. C. A., were valid and that the federal court had jurisdiction.

5. The court erred in holding that petitioner's action was barred by virtue of the limitation provisions of Sections 1013 and 1014, R. S. Mo. 1939.

6. The court erred in failing to hold that respondent's improper acts within the meaning of Sections 1031 and 1012, R. S. Mo. 1939, had prevented petitioner from com-

mencing his action for reformation before February 25, 1939, and March, 1942.

7. The court erred in holding that Section 72, Title 28, U. S. C. A., in providing that after a petition and bond for removal were filed by a nonresident of Missouri, then that "the State court shall proceed no further in such suit," because said command of the statute by the Congress was a command to the State of Missouri to deny to petitioner the right to maintain his suit in the State court after having instituted it therein, which act of the State of Missouri through its court was prohibited by the privileges and immunities provision of Section 1 of the XIVth Amendment.

8. The court erred in holding that Congress was authorized to enact a law compelling the State of Missouri to deny to petitioner the fundamental right to maintain his suit in the court of the State, which right was secured to petitioner as a citizen of the United States, by the privileges and immunities clause of the XIVth Amendment.

ARGUMENT.

The reasons given in the petition for the writ so plainly state the position of the petitioner and show his right to have the writ prayed for that he waives argument except as follows:

Argument.

I.

The rule in equity which prevented the principle of laches from barring relief is preserved in Section 1031, **R. S. Mo. 1939, with reference to the improper acts of a defendant preventing commencement of an action. And consequently neither limitations nor laches has any application to this case in view of the fact that petitioner, instead of consenting or acquiesing in respondent's wrong, has been most diligent in his futile chase of mistaken remedies.**

This Court, in *Bogert* v. *Southern Pacific*, 250 U. S. 1099, has held that such futile efforts by a plaintiff, resulting in 18 mistaken suits and the lapse of 22 years, did not bar a recovery against the defendant in that case.

This Court has also, in *Order of R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342-349, held that, l. c. 348:

> "A State statute of limitations can hardly destroy a claim because the period of actual contest over it in a federal tribunal extends beyond the limitation period."

The fact that the federal courts questioned petitioner's good faith does not justify his defeat herein.

The Court of Appeals in its opinion said:

> "The petition attempts to escape the general statute of limitations and to bring itself within the special statute Mo. R. S. A., Section 1014, which allows an action for relief on the ground of fraud to be instituted within five years after the accrual of the right. The cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years of the facts constituting the fraud."

Said language, on its face, discloses that said statute is applicable only to an action founded on fraud.

The action herein is based on contract. It seeks to reform a contract. The allegations concerning fraud were not set up as a cause of action, but, under the Missouri rule, to avoid limitations and laches.

The further statement in the preceding part of the opinion, that the action is barred by Section 1013, discloses that said Section 1013 deals with instruments in writing, or contracts. Sec. 1031 applies where improper acts "prevent the commencement of an action" whether founded on "fraud" under Section 1014 or on contract under Section 1013. See *Scott* v. *Arnold,* 2 Mo. 13; *Foley* v. *Jones,* 52 Mo. 64; *Harper* v. *Pope,* 9 Mo. 402; *Butler* v. *Lawson,* 72 Mo. 227 (where an action was filed forty years after a wrong was done and was timely; *Citizens Bank of Festus* v. *Frazier,* 177 S. W. (2d) 477.

In *Turnbull* v. *Watkins,* 2 Mo. App. 235, the exact question here presented was decided, where the court said, l. c. 239:

> "It is argued that the petition presented a case, not for breach of contract, but for an alleged fraud; that therefore the limitation of five years attached to the demand, so that the plaintiff's instructions were improper, and the defendant's ought to have been

given. It is true that the petition alleges fraud, and attempts, apparently, to evade the five-years limitation by declaring that plaintiff first discovered the fraud five years prior to the commencement of the suit. But the basis of the action is manifestly the written contract framed with the receipt given to Shaffner. But for that, there would be no right of recovery at all. Plaintiff's taking up of the bill, through Whittelsey, would have been treated as a voluntary payment, excluding any claim for redress. But, with the written contract, this feature becomes an item of damages for the breach thereof. It performs no other office here, though attended with an alleged deceit practiced by the defendant. The court, therefore, did not err in refusing to apply to the claim sued on the statutory limitation of five years."

The authorities in other States are the same. (*Brick* v. *Cohn-Hall-Marx Co.,* 276 N. Y. 259; *Missouri Savings & Loan Co.* v. *Rice,* C. C. A. 8, 84 Fed. 131; *Gregory* v. *Williams,* 189 Pac. 932; *Ross* v. *Saylor,* 39 Mont. 559, which involved an oral contract and the court held that it was an action on contract and not on fraud.)

So that the discussion on pages 78 and 79 with reference to Section 1014 has no application whatsoever. And, in view of the fact that an improper act under Section 1031 may prevent the commencement of an action even without the fraudulent intent present in this case (*Harris* v. *Pope,* 9 Mo. 402), it is apparent that the Circuit Court of Appeals rendered a decision in conflict with the decision of this Court in *Guaranty Trust Company* v. *York,* 65 S. Ct. 1464, when it affirmed the judgment of the trial court by holding that the suit for reformation was barred by a statute which had no application thereto, and which action resulted from the failure of respondent to plead

any applicable statute of limitations by specifying the section thereof.

The reason that it did not do so was that there was no such statute. And so the decision of the Court of Appeals is in conflict with said decision of this Court. Incidentally, petitioner's pleading in the reformation suit was filed in the State Court and was not filed in the Federal Court and conformed only to State Court rules.

II.

The XIVth Amendment recognizes that a human being is capable of existence in two legal capacities and can be a citizen of two sovereignties. The first sentence is:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."

The lower courts ignored the allegations in petitioner's pleading, disclosing that he exists in this case in both of said legal capacities, and that he brought the reformation suit in both of said legal capacities. And while the courts, State and Federal, recognize the distinction between United States citizenship and State citizenship, yet the lower courts in this case treat the distinction which the Constitution makes as nonexisting, and also disposed of the removal question by deciding that a United States citizen lost his permanent existence as such in the subordinate personality of a citizen of a State.

To state the question or proposition is to demonstrate the error of the lower courts on this question in this case. It was necessary for the lower courts in this case, if they would sustain the validity of the removal acts and their

own jurisdiction, to write out of the XIVth Amendment the provision that:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States."

It was also necessary to write out the allegation of petitioner's United States citizenship from his pleading. But it is there (3). It was also necessary for the lower courts to write out of the XIVth Amendment the second clause thereof as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Because they denied to petitioner, under the acts of Congress involved, the rights secured to him by said quoted provisions, all they left in the XIVth Amendment was the following words of the first sentence

> "* * * and of the State wherein they reside."

By the ruling of the Court of Appeals on limitations, petitioner was denied the equal protection of the laws secured by the XIVth Amendment; and by reason of the prejudice evidenced by the statements in the record, the due process provision of the Vth and XIVth Amendments was denied.

Ought not the foregoing to be a complete answer to the idea that the removal statutes, as applied to this petitioner in his capacity as a citizen of the United States, were effective to give the lower courts jurisdiction?

III.

But even as to citizens of different States, the removal acts involved herein are void at least where the controversy involves no federal question.

It is true, the Constitution provides that the judicial power shall extend to controversies between citizens of different States. But the Constitution does not deny the State courts power to entertain jurisdiction of controversies between citizens of different States. It merely authorizes litigants of different States who have such controversies to invoke the judicial power of the United States by instituting suits in courts to which the judicial power may properly extend, to-wit, the Federal Courts. It does not prevent citizens of different States from instituting suits in any court in which they can obtain jurisdiction of their opponents.

A citizen of any State of the United States who finds a citizen of any other State against whom he has a claim may institute a suit against him in any court on earth. The fact that it was so mentioned in the Constitution did not prevent petitioner herein from suing respondent in Canada, in which dominion it operates. This is true as to all the countries south of the Rio Grande, and as to all of the countries east of the Atlantic and west of the Pacific if respondent could there be found. And the provision in the Constitution could not in any way avail either litigant, or enable either to extend the judicial power to such controversy.

And when the Constitution was adopted it was a Constitution adopted by sovereign States, each of which was then exercising sovereign power, and in virtue of such sovereign power exercised jurisdiction over controversies between citizens of different States and the Nation, or any

person who might choose to become a suitor in the court of any State. When the Constitution was adopted it contained in it, and on its face, all the powers which the States delegated through it to the United States, and no power was granted to the United States unless it was granted to it after the fashion described by this Court in *Claflin* v. *Housman*, 93 U. S. 130, when it adopted the statement on that subject by Alexander Hamilton in the LXXXII number of the Federalist.

And while there the subject being discussed was the concurrent jurisdiction of cases arising under the Federal Constitution and laws: Yet the same principle applies to the question now being discussed. And this Court there pointed out that exclusive delegation of authority to the Federal Government can arise only in one of three ways:

> "* * * Either by express grant of exclusive authority over a particular subject; or by a simple grant of authority, with a subsequent prohibition thereof to the States; or, lastly, where an authority granted to the Union would be utterly incompatible with a similar authority in the States; he says that these principles may also apply to the *judiciary* as well as the legislative power. Hence, he infers that the State courts will retain the jurisdiction they then had, unless taken away in one of the enumerated modes."

Mr. Hamilton, of whom this Court in the above case said, with reference to his examination of concurrent jurisdiction of the State and Federal Courts:

> "It was fully examined in the 82nd number of The Federalist, by Alexander Hamilton, with his usual analytical power and farseeing genius; and hardly an argument or a suggestion has been made since which he did not anticipate."

In his LXXXII number Mr. Hamilton points out that his remarks in his number XXXII of the Federalist, dealing with the sovereignty of the States, applied also to the judiciary. There he said:

> "And this being the case, *I perceive at present no impediment to the establishment of an appeal from the state courts, to the subordinate tribunals;* and many advantages attending the power of doing it may be imagined. *It would diminish the motives to the multiplication of federal courts* and would admit of arrangements calculated *to contract the appellate jurisdiction of the supreme court.* The state tribunals may then be left with a more entire charge of federal causes; and appeals in most cases in which they may be deemed proper, instead of being carried to the supreme court, may be made to lie from the state courts, to district courts of the union." (Italics ours.)

This Court itself, in the case of *Teal* v. *Felton,* 12 How. 284, 13 L. Ed. 900, l. c. 292, expressly declared that the provision of the Constitution providing for the vesting of the judicial power and its extension to certain cases or controversies, did not oust, or attempt to oust, any State Court of the concurrent jurisdiction which existed in the States at the time of the adoption of the Constitution. And consequently the statement of Chief Justice Marshall in *Hodgson* v. *Bowerbank,* 5 Cranch 303, now applied to the question here involved, would end the controversy in favor of petitioner. For the Chief Justice there said:

> "Turn to the article of the Constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the Constitution."

Where can the Court find anything in the Constitution justifying an artificial person of another State, at its

mere desire, by the exercise of its discretion or whim to deprive a court of a sovereign State of its attribute of sovereignty, to-wit: the jurisdiction of one of its courts to do justice as it had done before the adoption of the Constitution?

IV.

The Court will note that in *Cohen* v. *Virginia*, 6 Wheaton 264, in justifying the application of Section 25 of the Judicial Code to State Courts, Chief Justice Marshall called attention to the fact that the Continental Congress and the Confederation had approved appeals to the National courts from the courts of the States in many cases, and therefore concluded that it was the intent of the Convention to make the rules which were applicable to the courts of the States before the Constitution was adopted applicable under the Constitution on the question of appellate jurisdiction. The language in *Cohen* v. *Virginia* demonstrates that never before that time had any action been transferred from any State court to any national court, and consequently the rule by virtue of which the Chief Justice held the Constitution extended judicial power by the appellate method to the State courts would not apply with reference to removal to courts of original jurisdiction.

In *Cohens* v. *Virginia*, in justifying the extension of the judicial power by writ of error to the judgment of a court of a State wherein a federal right was involved, the court said, l. c. 417:

> "Previous to the adoption of the confederation, Congress established courts which received appeals in prize causes decided in the courts of the respective states. This power of the government, to establish

tribunals for these appeals, was thought consistent with, and was founded on, its political relations with the states. These courts did exercise appellate jurisdiction over those cases decided in the state courts, to which the judicial power of the federal government extended.

The confederation gave to Congress the power 'of establishing courts for receiving and determining finally appeals in all cases of captures.'

This power was uniformly construed to authorize these courts to receive appeals from the sentences of state courts, and to affirm or reverse them. State tribunals are not mentioned; but this clause in the confederation necessarily comprises them. Yet the relation between the general and state governments was much weaker, much more lax, under the confederation than under the present constitution; and the states being much more completely sovereign, their institutions were much more independent."

Chief Justice Marshall found it necessary to refer to the fact that appeals from State to National courts were authorized by the Continental Congress and by the Articles of Confederation to justify the extension of the judicial power of the United States by the appellate method to final judgments of the courts of the States. No such precedent exists to justify the enactment of the removal statutes here involved, for that method was never used before the adoption of the Constitution. But that method could be applied to all cases enumerated in the 3rd article of the Constitution if it can be applied to diversity of citizenship cases. And, as pointed out in *Cohens* v. *Virginia*, l. c. 422, *infra*, if the judicial power could be extended to all cases enumerated in the 3rd article of the Constitution, it would result in a complete consolidation of the States.

In *Cohens* v. *Virginia*, 6 Wheaton 264, l. c. 384-385, in discussing the extent of the judicial power, Chief Justice Marshall pointed out that it should be coextensive with legislative power, and in effect declared that the standard of sovereignty applied by Hamilton in his number XXXII of the Federalist to the concurrent power of State and Union to tax applied to the judicial departments of both sovereignties, saying:

> "* * * the judicial power of every well-constituted government must be coextensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.
>
> If any proposition may be considered as a political axiom, this, we think, may be so considered."

The above language of the Chief Justice, if applied to the State governments, would destroy the diversity jurisdiction by removal, for if

> "* * * the judicial power of every well constituted (State) government must be coextensive with the legislative (power of the State) and must be capable of deciding every judicial question which grows out of the Constitution and laws (of the State),"

then how can the diversity (concurrent) jurisdiction of the courts of the States to decide

> "every judicial question which grows out of the Constitution and laws (of the State)"

after it has attached to any case be divested by a mere act of Congress giving a non-resident a right to deprive the State court of the power of deciding every such judicial question?

Since the above is a political axiom that must be applied to

"every well constituted (State) government,"

does not the application of that axiom destroy the diversity jurisdiction of the federal courts acquired by way of removal?

In discussing the question of concurrent jurisdiction of State and Nation, Hamilton, in his No. 32 of the Federalist, which in No. 82 he applied to the judiciary, said:

> "The necessity of a concurrent jurisdiction in certain cases, results from the division of the sovereign power; and the rule that *all authorities*, of which the states are not *explicitly divested* in favour of the union, *remain with them in full vigour*, is not only a theoretical consequence of that division but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed constitution. We there find, that notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the states, *to insert negative clauses prohibiting the exercise of them by the states.* The *tenth section of the first article consists altogether of such provisions.* This circumstance is a clear indication of the sense of the convention, and furnishes a *rule of interpretation out of the body of the act*, which justifies the position I have advanced, and refutes every hypothesis to the contrary."

But in *Cohens* v. *Virginia* the court pointed out that the Constitution never contemplated that the judicial power of the United States could be extended to all cases enumerated in the third article of the Constitution, for that would result in a complete consolidation of the States with reference to judicial power, saying, l. c. 422:

> "If it shall be established, he says, that this court has appellate jurisdiction over the state courts in all

cases enumerated in the 3d article of the constitution, a complete consolidation of the states, so far as respects judicial power, is produced.

But, certainly, the mind of the gentleman who urged this argument is too accurate not to perceive that he has carried it too far; that the premises by no means justify the conclusion. 'A complete consolidation of the states, so far as respects the judicial power,' would authorize the legislature to confer on the federal courts appellate jurisdiction from the state courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases in the decision of which the nation takes an interest, is too obvious not to be perceived by all."

In his No. 32 of the Federalist Alexander Hamilton discusses the same proposition with reference to the legislative powers of States and Nation as follows:

"An entire consolidation of the states into one complete national sovereignty, would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union; and in another, prohibited the states from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant*."

It thus appears that the judicial power of the United States, insofar as its appellate feature was involved, could not be extended to diversity jurisdiction cases simply because of the diversity of citizenship. Before the judicial power involved in the appellate jurisdiction could be extended to such case, the jurisdiction of a State court over a federal question must be raised in the record. For a like reason, as to diversity cases, judicial power of the United States cannot be extended by the removal method to a diversity of citizenship case involving no federal question instituted in a State court. Otherwise, removal is based, not upon the proposition that any federal question is involved, and not for the reason that any question of local prejudice is involved, but for the sole reason that the nonresident desires to deprive the State court of its jurisdiction and to vest jurisdiction in a federal court in a case where no federal question is involved.

The statement in *Guaranty Trust Company* v. *York*, 65 S. Ct. 1464, to the effect that:

> "* * * since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, *only another court of the State*, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State,"

would seem to get perilously close to the danger referred to in his Federalist number 32 by Hamilton, and at page 422 in *Cohens* v. *Virginia* by Marshall, with reference to an entire consolidation of the States into one complete national sovereignty, either through the legislature or through the judiciary, and hence would destroy that federalism which is the desire of this Court to preserve, as pointed out in *Guaranty Trust Co.* v. *York, supra.* For, if

in a diversity of citizenship case the federal court be only another State court, then what becomes of the time-honored principle so essential to that federalism stated in *Claflin* v. *Houseman,* 93 U. S. 130, l. c. ....., as follows:

> "It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman* v. *Booth,* 21 How. 506, 16 L. Ed. 169; and hence the State Courts have no power to revise the action of the Federal Courts, nor the Federal the State, except where the Federal Constitution or laws are involved."

We respectfully submit that the solution of the entire difficulty is well stated by this Court in *Claflin* v. *Houseman, supra,* where, quoting Hamilton, it says:

> "Here another question occurs: what relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer, *that an appeal would certainly lie from the latter, to the Supreme Court of the United States.*"

It follows that the solution of the entire problem would be to recognize the truth, that the removal acts with reference to diversity cases, and perhaps all cases of which a State court has concurrent jurisdiction with the federal court, are void and can confer no jurisdiction on any federal court of any case properly instituted in a State court having jurisdiction thereof until "its duty is fully performed and the jurisdiction involved is exhausted."

The opinion in *Cohens* v. *Virginia* thus discloses that, had the judicial power of the United States been extended to all those cases enumerated in the 3d Article of the Constitution, it would result in a complete consolidation of the States so far as concerns judicial power.

The statement in the opinion in *Guaranty Trust Co. of New York* v. *York,* to the effect that in a diversity of citizenship case a federal court is merely another court of the State, is a decision which, if followed to its logical conclusion, must result in a complete consolidation of the States so far as respects judicial power.

And so we call attention to the opinion in *Cohens* v. *Virginia,* so that it may now have that effect which it had at another day and time on the destiny of this Nation.

In Beveridge's Life of John Marshall, Vol. 4, pp. 343, 344, it is said:

> "The opinion of John Marshall in the Cohens case is one of the strongest and most enduring strands of that mighty cable woven by him to hold the American people together as a united and imperishable nation.
>
> "Fortunate, indeed, for the Republic that Marshall's fateful pronouncement came forth at such a critical hour. * * *
>
> "Could John Marshall have seen into the future he would have beheld Abraham Lincoln expounding from the stump to the farmers of Illinois, in 1858, the doctrines laid down by himself in 1819 and 1821."

As the opinion in *Cohens* v. *Virginia* materially contributed to preserve this Nation from disunion in that day, we respectfully submit that its application to the issues herein will prevent the threatened consolidation of the States which may result from the decision of this Court in holding that, in a diversity case, the federal court is merely another court of the State.

V.

The following resume of the effect of the privileges and immunities clause of the XIVth Amendment is respectfully submitted.

In *Corfield* v. *Coryell,* Fed. Cas. No. 3230, Justice Washington, discussing the meaning of privileges and immunities as set out in Article IV, said:

> "We feel no hesitation in confining these expressions (in the Constitution) to those privileges and immunities which are in their nature fundamental; which belong, of right, to the citizens of all free government; and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and to obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen * * * to institute and maintain actions of any kind in the courts of the state; to take hold and dispose of property, either real or personal; * * * may be mentioned as some of the privileges and immunities of citizens which are clearly embraced by the general description of privilege deemed to be fundamental."

Among the rights of which petitioner was deprived was the right to *maintain* this action, as it was his right to "institute" it. This is a fundamental right, referred to in *Corfield* v. *Coryell,* 4 Wash. 371.

The State Court in *Mining and Milling Co.* v. *Fire Insurance Company,* 267 Mo. 524, l. c. 585, said:

> "The clear purpose of all of our statutes when taken together was to give full force and effect to

said Section 10 of Article 2 of the Missouri Constitution, which provides that,

'The courts of justice shall be open to *every person.*' Not a part of them. Not to the citizens or residents of Missouri only, nor to the citizens of the United States only, but to all persons of the world who demand justice at the hands of our courts against any one who may be found within the jurisdiction of this state, whether resident, nonresident, individual or corporation. This is perfectly clear from the reading of that section of the Constitution which says *every person* may sue. Not only that, but the same section further provides that 'certain remedy' (shall be) afforded *for every injury to person, property or character,* etc. This provision is not limited to *some of the injuries* that have or may be done to the person, property and character of those mentioned in the preceding clauses, but by clear and unambiguous words includes *every one of the character mentioned.*'' (Italics court's.)

That court in said case, at l. c. 592, quotes from *Chambers* v. *Railroad,* 207 U. S. 142, in which case, at l. c. 148, it is said:

''In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to *sue* and *defend* in the courts is the alternative of force. In an organized society *it is the right conservative of all other rights,* and lies at the foundation of orderly government. It is one of the *highest and most essential privileges of citizenship,* and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but *is granted and protected by the Federal Constitution. Corfield* v. *Coryell,* 4 Wash. C. C. 371, 380, Fed. Cas. No. 3230, per Washington, J.; *Ward* v. *Maryland,* 12 Wall. 418, 430, 20 L. Ed. 449, 452,

per Clifford, J.; *Cole* v. *Cunningham,* 133 U. S. 107, 114, 33 L. Ed. 538, 542, 10 Sup. Ct. Rep. 269, per Fuller, Ch. J.; *Blake* v. *McClung,* 172 U. S. 239, 252, 43 L. Ed. 432, 437, 19 Sup. Ct. Rep. 165, per Harlan, J." (Italics ours.)

In the opinion of Mr. Justice Harlan in that case, after quoting *Corfield* v. *Coryell,* the following language is used, l. c. 155:

> "Among the particular privileges and immunities which are clearly to be deemed fundamental, the court in that case specifies the right '*to institute and maintain actions of any kind in the courts of the state*'."
> Quotation and italics by Justice Harlan.

In *McKnett* v. *Railway,* 292 U. S. 230, l. c. 233, the court approved *Corfield* v. *Coryell, saying*:

> "The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution. The privileges and immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens. *Corfield* v. *Coryell,* 4 Wash. C. C. 371, 381, Fed. Cas. 3230. Compare *Canadian Northern R. Co.* v. *Eggen,* 252 U. S. 553, 64 L. Ed. 713, 40 S. Ct. 402."

In *Canadian Northern R. Co.* v. *Eggen,* 252 U. S. 553, l. c. 560, the court said:

> "This court has never attempted to formulate a comprehensive list of the rights included within the 'privileges and immunities' clause of the Constitution (Art. 4, Sec. 2), but it has repeatedly approved as authoritative the statement by Mr. Justice Washington, in 1825, in *Corfield* v. *Coryell,* 4 Wash. C. C.

371, 380, Fed. Cas. 3230 (the first federal case in which this clause was considered), saying: 'We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental.' *Slaughter House Cases*, 16 Wall. 36, 75, 21 L. Ed. 394, 408; *Blake* v. *McClung*, 172 U. S. 239, 248, 43 L. Ed. 432, 435, 19 Sup. Ct. Rep. 165; *Chambers* v. *Baltimore & O. R. Co.*, 207 U. S. 142, 155, 52 L. Ed. 143, 149, 28 Sup. Ct. Rep. 34. In this Corfield case the court included in a partial list of such fundamental privileges, 'the right of a citizen of one state * * * to institute and maintain actions of any kind in the courts of another'."

It is true that the courts in the foregoing cases do not discuss the XIVth Amendment, but only Clause 2 of Article IV. However, Section I of the XIVth Amendment reversed the order of things existing before its adoption, and as a result thereof citizenship in a state is a result of citizenship in the United States. In *United States* v. *Hall*, Fed. Cases No. 15282, it is said:

> "By the original Constitution, citizenship in the United States was a consequence of citizenship in a state. By this clause this order of things is reversed * * * and citizenship in a state is a result of citizenship in the United States."

Mr. Justice Bradley, in the Slaughter House Case, Fed. Cas. No. 8408, said:

> "The privileges and immunities secured by the original Constitution were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens and against the citizens of other states.
>
> But the Fourteenth Amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens

or any others. It not merely requires equality of privileges, but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired."

In *Bradwell* v. *Illinois*, 16 Wall. 130, it is said:

"There are certain privileges and immunities which belong to a citizen of the United States as such; otherwise, it would be nonsense for the Fourteenth Amendment to prohibit a state from abridging them."

In discussing the effect of the XIVth Amendment, Chief Justice White, in *Arver* v. *United States*, 245 U. S. 366, pointed out that the XIVth Amendment

"* * * broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative * * *."

These authorities are cited with approval by the Supreme Court in *Colgate* v. *Harvey*, 296 U. S. 403-404.

The only privilege created by Section I of the XIVth Amendment is that vested in a United States citizen to become a citizen of any state in which he resides. In the Slaughter House cases, 16 Wall. 80, it is said:

"One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state."

Since, therefore, Mr. Kithcart is a citizen of the United States, and since citizenship in Missouri is a privilege conferred by Section I of the XIVth Amendment, it fol-

lows that any act of the State of Missouri which abridges any right he has as such citizen of Missouri likewise abridges any right he has as a citizen of the United States.

Another privilege referred to in Slaughter House cases which is guaranteed by the XIVth Amendment is

> "• • • the right of free access to • • • the • • • courts of justice in the several states."

This, under the foregoing authorities, of course, includes the courts of the state of which the United States citizen is a citizen.

Senator Howard of Michigan presented the XIVth Amendment to the Senate of the United States on May 23, 1866. He was a member of that reconstruction committee which had formulated the Civil Rights Bill of 1866, and which committee were fearful it might be held unconstitutional, or repealed by some succeeeding Congress, and hence they offered the XIVth Amendment to secure by the Constitution what they regarded as a declaration of the fundamental rights of citizens of the United States. Amongst other things, the Civil Rights bill provided that citizens

> "• • • shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefits of all laws and proceedings for the security of persons and property, and shall be subject to like punishments, pains and penalties and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding."
>
> (Flack, The Adoption of the Fourteenth Amendment, p. 20.)

Flack speaks of Senator Howard further at pages 84-85:

> "He spoke at considerable length as to the purpose and effect of the first section, saying that it was a general prohibition upon the 'states, as such, from abridging the privileges and immunities of the citizens of the United States.' The privileges and immunities spoken of, he declared, were those belonging to 'citizens of the United States, as such, and as distinguished from all other persons not citizens of the United States.' These privileges and immunities had never been defined, and it was not his purpose, he said, to undertake to define all of them, though he regarded those spoken of in section two of the Fourth Article of the Constitution as being among them. He quoted the decision of Justice Washington in *Corfield* v. *Coryell* (4 Washington Circuit Ct. Repts., p. 380) *to show what some of those privileges were.* The court did not, in that decision, undertake to enumerate all the privileges and immunities secured by that section, but said that they might be included under the following general heads: 'protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or to reside in any other state, for purposes of trade, agriculture, professional pursuits, and otherwise; to claim the benefit of the writ of *habeas corpus; to institute and maintain actions of any kind in the courts of the state;* to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by other citizens of the state." (Italics ours.)

Senator Howard, therefore, pointed out that the people incorporated the decision of *Corfield* v. *Coryell* into the

first section of the XIVth Amendment to show that one of the privileges of a citizen of the United States is

> "* * * to institute and *maintain* actions of any kind in the courts of the state."

This same principle has been recognized by the Supreme Court in *United States* v. *Wong Kim Ark*, 169 U. S. 649, where the genesis of the XIVth Amendment was under discussion. The Civil Rights Act of 1866, passed at the first session of the Thirty-ninth Congress, began by enacting that citizens of the United States

> "'* * * shall have the same right in *every state* and territory *of the United States* to make and enforce contracts, *to sue, be parties* and give *evidence*.' * * * The same Congress, shortly afterwards, evidently thinking it unwise and perhaps unsafe to leave so important a declaration of rights to depend on an ordinary act of legislation which might be repealed by any subsequent Congress, framed the 14th Amendment to the Constitution."

So that evidently one of the purposes of the XIVth Amendment was to prevent any state or any subsequent Congress from emasculating the declaration in the civil rights act, that citizens of the United States

> "* * * shall have the *same right in every state* and territory of the United States to make and enforce contracts, *to sue, be parties*, and *give evidence*." (Italics ours.)

In Flack, at pages 231-232, is the following language:

> "Mr. Bingham, who drafted the first section of the Fourteenth Amendment with the exception of the first clause, followed Mr. Farnsworth with a very able speech. Probably more weight should be given the utterances of Mr. Bingham as to the interpreta-

tion of that section than to those of any other, and we shall, therefore, give considerable attention to what he said on this occasion.

* * * * * * *

"The last clause of that section meant, he declared, that no State should deny to any one the equal protection of the Constitution of the United States, or any of the rights which it guaranteed to all men, nor should it (the State) deny to anyone any right secured to him by the laws and treaties of the United States or of such State. The first section was declared to be as comprehensive as 'We will sell to no man, will not deny or delay to any man right or justice' of the Magna Charta."

It thus appeared that the same prohibition contained in Section 10 of Article I of the U. S. Constitution, which prevents Missouri from making treaties, granting letters of marque and reprisal, coining money, emitting bills of credit, making anything but gold and silver coin a tender in payment of debts, passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or granting any title of nobility, have no greater force, no greater constitutional vigor than does the first section of the XIVth Amendment prohibiting Missouri from denying to this petitioner his right *to maintain* this suit in the State court. The legislator who wrote the first section of the XIVth Amendment expressly so declared. See Flack, pages 233-234:

"He then proceeded to explain why he had changed the form of the Amendment as first introduced in February. He had taken counsel of Marshall in the hope that 'the Amendment might be so framed that in all the hereafter it might be accepted by the historian of the American Constitution and her Magna Charta 'as the keystone of American liberty.' The decision of Marshall in *Barron* v. *The Mayor and*

City Council of Baltimore, (7 Peters, p. 250) induced him, he declared, to attempt to impose new limitations upon the power of the States by a Constitutional Amendment."

* * * * * * *

"Mr. Bingham then stated that, while re-examining the case of Barron, after his struggle with Congress in February, he had noted and apprehended as never before, certain words used by Marshall in that decision. He quoted the following words used by Marshall in reference to the first eight Amendments: 'Had the framers of these Amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original Constitution, and have expressed that intention.' He said he acted upon that suggestion and imitated the framers of the original Constitution. Just as they had said, 'No State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts,' so had he said, in the first section of the Fourteenth Amendment that 'No State shall make or enforce any law,' etc., imitating them to the letter. He then added: 'I hope the gentleman (Mr. Farnsworth) now knows why I changed the form of the Amendment of February, 1866'."

This Court in *Screws* v. *United States,* 89 Law Ed. 1009, has cited and quoted Mr. Flack's work copiously.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that justice be done herein and that the conflicts on the important questions herein involved be corrected, and that to such end a writ of certiorari should be granted, and this Court should review

the decision of the United States Circuit Court of Appeals for the Eighth Judicial Circuit and finally reverse it.

Respectfully submitted,

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